

CONFIDENTIAL

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

OCT 29 2018

BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT

David J. Smith
Clerk

Judicial Complaint Nos. 11-18-90082 and 11-18-90083

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against U.S. Magistrate Judge _____
and U.S. District Judge _____ of the U.S. District Court for the _____
District of _____, under the Judicial Conduct and Disability Act of 1980,
Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

_____ (“Complainant”) has filed this Complaint against United States Magistrate Judge _____ and United States District Judge _____ (collectively, “the Subject Judges”), pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (“JCDR”).

Background

The record shows that in December 2016 _____ filed a 28 U.S.C. § 2241 petition for writ of habeas corpus in which he generally took issue with various events that occurred at his place of incarceration. After various proceedings, in October 2017 _____ filed in this Court a petition for writ of mandamus, seeking an order directing the district court to rule on the § 2241 petition and contending that the court had unreasonably delayed ruling in the matter. He also filed a motion to proceed in forma pauperis (IFP). In December 2017 his IFP motion was denied because the mandamus petition was frivolous and he had not established a non-frivolous claim of unreasonable delay. After that, the mandamus petition was clerically dismissed for want of prosecution.

In April 2018 _____ filed another mandamus petition, again contending that the district court had unreasonably delayed ruling on his § 2241 petition, and he filed a motion to proceed IFP. In July 2018 his IFP motion was denied because the mandamus petition was frivolous and he had not established a non-frivolous claim of unreasonable delay. The mandamus petition was later clerically dismissed for want of prosecution.

Meanwhile, in May 2018 _____ filed in the district court a “Request to file Summary Judgment.” Later that month, Judge _____ issued an order construing

that request as a motion for leave to file a motion for summary judgment, which was denied. Judge _____ issued a separate order which also construed the request as a motion to expedite proceedings, which was denied because review in the court's normal course would not be prejudicial to _____ interest or constitute undue delay.

The record also shows that in January 2018 _____ filed a prisoner civil rights action against multiple defendants, generally alleging that the defendants had violated his constitutional rights. He then filed, among other things, a motion for the appointment of counsel. In February 2018 Judge _____ entered an order denying the motion for appointment of counsel, finding from a review of the complaint that _____ could "adequately articulate the facts and grounds for relief without notable difficulty," his complaint was "not of undue complexity," and he had not shown exceptional circumstances justifying the appointment of counsel. _____ filed a motion for reconsideration and a motion for summary judgment.

In May 2018 Judge _____ issued an order directing _____ to file an amended complaint, stating that his initial pleading contained "claims not related to each other in either time or type" and that the allegations were "set forth in a rambling, conclusory, and narrative form making it difficult to decipher specific claims against each individual defendant." The next month, _____ filed an amended complaint against multiple defendants. Judge _____ issued an order striking the amended complaint, finding that it failed to comply with the court's previous directive that it assert only claims arising out of the same incident or facts. In August 2018 _____ filed a second amended complaint raising various claims. Judge _____ issued orders that, among other things, denied _____ motions seeking the appointment of counsel.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant states that he assisted _____ with the filings in the two cases described in the background section of this Order. Complainant notes that Judge _____ called a complaint he drafted on _____ behalf "rambling" and "conclusory." He states, "Having had this very complaint reviewed by experienced counsel outside, I know this complaint is exactly the quality that would be expected of experienced counsel and is neither rambling nor conclusory."

Complainant states that _____ wrote a motion for summary judgment that seemed to trigger Judge _____ order directing _____ to re-write his complaint and stating that the complaint was confusing and insufficient. Complainant asserts that this order was "particularly odd" because Judge _____ had recently denied a motion for appointment of counsel on the ground that the complaint was "sufficiently well-drafted and adequate." Complainant states, "There is no other reasonable conclusion I can reach except that Judge _____ is abusing the legal process to extend the time for the

defendants to respond” He asserts that “similar misconduct is occurring in _____ habeas action . . . in front of the same supervisory judge in question, Judge _____.” Complainant asserts that Judge _____ “has a history of stalling out similar § 2241 proceedings until they become moot,” and he cites two cases which he contends support his assertion.¹

Complainant states that after _____ filed a petition for writ of mandamus, the district court “acted promptly but improperly,” ordering the respondent to respond to the merits despite having already done so. Complainant generally takes issue with what he asserts is delay in ruling in _____ case, stating that the court had the same information and argument before it, but had not ruled for more than a year. He states, “This conduct gives the impression and appearance that the District Judge _____ is colluding to delay these proceedings until they become moot,” as he allegedly did in two other cases. Complainant asserts that it seems the Subject Judges “are abusing the process and getting over on _____ pro se status.”

Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling.” The Rule provides that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” *Id.* The “Commentary on Rule 3” states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

In addition, Rule 3(h)(3)(B) provides that cognizable misconduct does not include “an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.” The “Commentary on Rule 3” provides that “a complaint of delay in a single case is excluded as merits-related. Such an allegation may

¹ In one case, which was initiated in April 2016, Judge _____ dismissed the case upon the parties’ joint stipulation of dismissal in October 2016. In the other case, initiated in April 2016, Judge _____ adopted a magistrate judge’s report and recommendation and dismissed the case as moot in July 2017.

be said to challenge the correctness of an official action of the judge—in other words, assigning a low priority to deciding the particular case.”

To the extent Complainant’s allegations concern the substance of the Subject Judges’ official actions, findings, rulings, and orders entered in _____ cases, the allegations are directly related to the merits of the Subject Judges’ decisions or procedural rulings. Apart from the decisions or procedural rulings that Complainant challenges, he provides no credible facts or evidence in support of his allegations that the Subject Judges issued rulings or delayed any cases with an improper or illicit motive or otherwise engaged in misconduct.

The allegations of this Complaint are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), and the Complaint “is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.



Chief Judge